STATE OF NORTH DAKOTA

COMMISSIONER OF INSURANCE

IN THE MATTER OF:	)	
	)	
Farmers Union Oil Company of Minot	)	**RECOMMENDED**
d/b/a Cenex of Minot	)	**FINDINGS OF FACT,**
	)	**CONCLUSIONS OF LAW,**
Application for compensation from the	)	**AND ORDER**
Petroleum Tank Release	)	
Compensation Fund	)	
	)	

. . . . . .

The Commissioner of Insurance ("Commissioner") is, by law, the Administrator of the Petroleum Tank Release Compensation Fund ("Fund"). N.D.C.C. § 23-37-02(2); N.D.C.C. § 26.1-22-02. Pursuant to N.D.C.C. § 28-32-05(e), on April 5, 2000, Farmers Union Oil Company, d/b/a Cenex of Minot ("Cenex"), through its attorney, Mark R. Hayes of Minot, filed a Summons and Complaint with the North Dakota Department of Insurance ("Insurance Department") requesting certain administrative action. Cenex is an applicant for compensation from the Fund, having first made application with the Fund on December 15, 1994. On April 25, 2000, the Fund, the Respondent, through its attorney, Charles E. Johnson, Special Assistant Attorney General, General Counsel, Insurance Department, filed an Answer to the Cenex Complaint.

On May 5, 2000, the Department of Insurance, on behalf of the Commissioner, requested the designation of an administrative law judge ("ALJ") from the Office of Administrative Hearings to conduct a hearing and to issue recommended findings of fact and conclusions of law, as well as a recommended order, to the Commissioner in regard to the Cenex Complaint. On May 8, 2000, ALJ Allen C. Hoberg was designated.

On May 12, 2000, the ALJ issued a Notice of Hearing and Specification of Issues. Based on the allegations of the Complaint and the responses of the Answer, the ALJ specified four issues, which counsel for the parties agreed are the four issues in this administrative matter. The ALJ specified the four issues, as follows:

1. Whether Cenex is entitled to compensation from the Fund based on the proven facts under the applicable laws.

2. If Cenex is entitled to compensation from the Fund, what is the amount of compensation to which it is entitled.

3. Whether the Fund has violated any provisions of the applicable laws in considering Cenex's application for compensation, as alleged in Cenex's April 5, 2000, Complaint.

4. Whether, in addition to any compensation from the Fund to which Cenex may be entitled under applicable law, Cenex is entitled to damages, attorney's fees, and costs, as alleged in Cenex's April 5, 2000, Complaint.

The hearing was held as scheduled on July 13, 2000, in the Fort Union Room, State Capitol, Bismarck, North Dakota. Cenex was represented at the hearing by Mr. Hays. The Fund was represented at the hearing by Mr. Johnson. Cenex called two witnesses at the hearing, Mr. Todd E. Zimmerman, Attorney at Law, Fargo, and Mr. Arthur A. Perdue, the General Manager of Cenex, Minot. The Fund called two witnesses, Mr. Gary W. Berreth, Program Manager, Underground Storage Tank and Leaking Underground Storage Tank Program, Division of Waste Management, North Dakota Department of Health ("Health Department"), and Mr. Jeff Bitz, whose title is Administrator of Special Funds with the North Dakota Insurance Department. Special Funds administers the Fund as the actual administrator, under the

Commissioner who is the statutory administrator. Seventeen exhibits were offered and admitted. The Fund offered exhibits 1-9, and 11-17. Cenex offered exhibit 10.

At the close of the evidentiary portion of the hearing, the ALJ heard oral argument from Mr. Hays and Mr. Johnson. He then closed the hearing. Following the close of the hearing, the next day, the ALJ reopened the record for counsel to file a stipulation of facts concerning a matter that the ALJ deemed may be important in the decision. See July 14, 2000, ALJ letter to counsel. On, July 24, 2000, Mr. Johnson filed a copy of Cenex's December 15, 1994, Application for Petroleum Tank Release Compensation Fund (SFN 17017) ("Application") with a short cover letter of explanation (copying Mr. Hays). It was received by the ALJ on July 24, 2000 (faxed). The ALJ took official notice of the Application. On July 24, the ALJ also received a letter of further explanation from Mr. Hays regarding the Application. The ALJ took official notice of the Hays letter. The ALJ considers the record in this matter closed as of the date of the receipt of the Application and cover letter, as well as Mr. Hays' letter. (The two letters and the Application are all part of the record as noticed and marked "ON".)

Based on the evidence presented at the hearing, the documents officially noticed, and the closing argument of counsel, the administrative law judge makes the following recommended findings of fact and conclusions of law.

FINDINGS OF FACT

1. On March 24, 1986, Roger Behm, as Tenant, entered into a lease agreement ("Lease") with General Growth Development Corporation ("General Growth"), as Landlord, for certain improved property ("Demised Premises") at the Dakota Square Shopping Center ("Dakota Square") in Minot. Exhibit 1, Lease. The evidence shows that either Behm's predecessor or General Growth, or its predecessor, (in other words, the Mall owner at a time

before the Behm lease agreement or a Tenant before Behm) built a gas station and convenience store on the location of the Demised Premises. The same person or company that built the gas station and convenience store installed "underground storage tanks" and an "underground storage tank system" as such terms are defined in N.D. Admin. Code § 33-24-08-03. The Demised Premises, with gas station and convenience store, were then maintained and operated by Behm pursuant to the lease.

2. On August 9, 1994, Behm, as Assignor, and Cenex, as Assignee, entered into an Assignment of Lease and First Lease Amendment (an "Assignment"). The Demised Premises were then maintained and operated thereafter by Cenex for the same use as Behm made of the Demised Premises, previously, *i.e.,* for the business of operating a gas station and convenience store. Exhibit 1. Cenex purchased the tanks and other equipment property and got a bill of sale when it took over the Behm operation.

3. Concordia Properties, L.L.C., a Delaware Limited Liability Company ("Concordia"), is the successor to General Growth's interest and rights as Landlord under the Lease and Assignment. Exhibit 1, Lease. Concordia purchased the property after the Assignment. It purchased the entire Dakota Square property in the summer of 1997. It was the owner of the Demised Premises. Under the Lease, Concordia had the right to improvements in the property after termination of the Lease. See exhibit 1, Lease. Concordia had the right to approve changes and improvements to the Demised Premises. *Id.* The Lease was a twenty year lease. *Id.* Concordia had a substantial financial and reversionary interest in the Demised Premises. *Id.* Concordia had the right to re-enter the Demised Premises upon default. *Id.*

4. In 1994, Cenex experienced a problem with the drinking water of the sink in the bathroom at the Dakota Square gas station. There was an odor of gasoline fumes. Cenex contacted the Health Department. The Health Department visited the site two or three times and

analyzed samples of water from the site. Sherry Niesar with the Health Department sent Cenex a letter on December 21, 1994. Exhibit 2. Niesar reported that samples showed the presence of gasoline in the water. She returned to the gas station and found that the air inside the gas station contained a large amount of vapors from fuel. She determined that the fumes seemed to be entering the gas station from the flexible PVC water line. On December 9, 1999, the Health Department, Neil Knatterud, Director, Division of Waste Management, Health Department, wrote to Cenex. Mr. Knatterud confirmed the findings of petroleum vapors and carcinogens in the water. *Id.* He stated that the Health Department "would consider this to be a confirmed release from your underground storage tank (UST) system and, accordingly, the North Dakota UST Rules require you to: (1) take immediate action to prevent any further release of the regulated substance into the environment; and (2) identify and mitigate fire, explosion and vapor hazards." *Id.* The letter also required Cenex to notify the Health Department in writing "what steps have been taken to insure that your UST system is not presently leaking, and what action will be taken to correct the water supply problem at the station." *Id.* The letter also informed Cenex about the Fund and indicated that Cenex may desire to apply to the Fund for financial assistance for the cost of investigative and remedial activities. *Id.* The Health Department also sent Cenex a "Second Notice" letter on February 22, 1995, essentially relating the same information that was stated in the December 9, 1994, letter. *Id.*

5. To remedy the drinking water problem, Cenex had a new pipe inserted inside the existing pipe and that seemed to provide adequate remediation. The odor problem seemed to be solved. Cenex complied with the Health Department's leak detection requirements at the time, finding no evidence of petroleum releases (leakage).

6. Nevertheless, on December 8, 1994, Cenex applied to the Fund for compensation (Application received by the Fund on December 15, 1994). See document officially noticed

("ON"). In the cover letter to the ALJ enclosing the Application, Mr. Johnson stated that "[t]his is the only application received by the Fund." He further stated that the Fund's procedure is "that after an application is filed, the Fund processes requests for payment for expenses relating to the release as the expenses are incurred," and that "[a]ll payments are then made pursuant to the initial application." *Id.*

7. Under EPA and state regulations, by 1998, all existing petroleum underground storage tanks had to be replaced by approved modern tanks.

8. On or about August 31, 1996, Cenex determined that it would cease operations at the Demised Premises and decided to remove the convenience store building, the pumps and canopies, as well as the underground storage tanks. Cenex decided to remove the building, pumps, canopies, and tanks because it believed it was not able to obtain enough property at the location to make its operation profitable and feasible. While removing the tanks, Cenex discovered release of petroleum (leakage) from the tanks.

9. Cenex had agreed with Concordia's predecessor that Cenex would remove the building, canopies and tanks of the gas station and convenience store operation and quit the Demised Premises. After Cenex removed the canopies and pumps, and after Cenex removed the tanks, Cenex razed the building (store). Cenex never signed an agreement with Concordia's predecessor in regard to canceling the lease because of a provision in the proposed agreement concerning clean-up from contamination. Cenex ceased paying rents on the Lease in the Summer of 1997 and tendered the property back to Concordia.

10. Cenex contacted the Health Department about removing the tanks prior to their removal and prior to discovering the leakage. Carl Ness of the Health Department arrived at the removal site on September 19, 1996, the day scheduled for tank removal. *See* exhibit 13. The first tank had been already been removed prior to Ness's arrival and the leakage had already been

discovered. Holes were observed in the first tank. Upon removal of the second tank, holes were also observed. Petroleum release or leakage occurred onto the Demised Property (the land rented by Cenex) and onto the adjoining (vacant) land. On September 19, 1996, Mr. Ness indicated to Cenex that remediation would be required.

11. On October 8, 1996, Mr. Knatterud sent a letter to Mr. Perdue outlining the remediation and monitoring required of Cenex because of the leakage. Exhibit 4.

12. On July 8, 1998, Mr. Berreth sent another letter to Mr. Perdue outlining the further monitoring and remediation activities required. Exhibit 5.

13. On August 20, 1998, Concordia filed a Complaint in federal district court against Cenex and Behm asking for a judgment against Cenex and Behm for certain monetary defaults; certain lease defaults; additional defaults under the lease; costs, expenses, and reasonable attorney's fees; for negligent, reckless, and/or intentional damage to the Demised Premises caused by contamination; for violation of N.D.C.C. ch. 32-40; for damages for creating a nuisance; and for injunctive relief requiring Behm and Cenex to return the Demised Premises to as good state and condition as they were when the Lease was first entered into. Exhibit 1.

14. Cenex first made the Fund aware of Cenex's claim for compensation as a result of the leakage on or about August 6, 1998. *See* July 21, 2000, letter from Mark Hays (ON). Cenex notified the Fund about the Concordia Complaint almost immediately when it was filed, on about August 24, 1998.

15. Ultimately, as the result of an October 1999 settlement conference, Cenex agreed to pay Concordia $125,000 because of the leakage. Behm filed for bankruptcy and was discharged. Behm was excused from the settlement conference. No one appeared for the Fund at the settlement conference. The Fund did not participate in the settlement conference though the Fund was notified of the settlement conference. *See* exhibit 10.

16. The $125,000 Cenex promised to pay Concordia included only Concordia's actual out-of -pocket costs of $57,933 for the cost of earth removal of contaminated soil, *i.e.,* for excavation, refill, and compacting work; and $48,246 for consulting fees for testing analysis, monitoring and proposing a remediation plan; as well as for further, future out-of-pocket costs for the installation of a vapor barrier (*i.e.,* the remainder of the $125,000 were costs associated with the possibility of the need for installation of a vapor barrier - the testimony at the hearing was that the vapor barrier would cost between $20,000 and $25,000). The earth moving (machinery and labor) was actually done by Earth Movers of Minot. It was done on the Cenex gas station lot and on the adjacent vacant property owned by Concordia. Consulting reports in regard to the petroleum release were actually prepared for Concordia by Braun Intertec, an environmental consulting firm of good reputation. The Braun Intertec reports related to just the leak as it affected Cenex leased property and the property adjoining the Cenex property. Braun Intertec submitted copies of these reports (7-8 detailed reports of 20-26 pages in length) to the Health Department. The purpose of a vapor barrier was for a potential need, to prevent petroleum product and petroleum fumes from affecting any new building that may be built on the site of the Cenex gas station and convenience store facility. No legal fees were part of the compensation to be paid by Cenex to Concordia. No amount of the compensation was for rent. Cenex did not compensate Concordia for any punitive damages.

17. On November 10, 1999, Concordia filed a Notice of Entry of Judgment in Federal District Court, stemming from its Complaint against Cenex. On November 4, 1999, Concordia filed a Judgment in the Amount of $125,000. Also, on November 4, 1999, Judge Conmy filed his Findings of Fact, Conclusions of Law, and Order for Judgment in the matter. Exhibit 9.

18. Cenex paid the Judgment in full. Concordia filed a Satisfaction of Judgment. On about November 15, 1999, Cenex sent a copy of the Judgment and statement of attorney's fees to

the Fund, *i.e.*, Cenex submitted to the Fund the payment of the $125,000 Judgment for reimbursement by the Fund because of the leakage of petroleum on its leased property. *See* Hays letter, ON. The Fund has not paid the $125,000.

19. Concordia has not made application to the Fund for compensation as a result of the leakage.

20. Braun Intertec did a tank removal report and was on site for the tank removal by Cenex in 1996.

21. None of the Braun Intertec consulting work was done at the request of the Health Department.

22. None of the excavation work done by Earth Movers was done at the request of the Health Department.

23. Cenex did not consult the Health Department about the advisability of installing a vapor barrier. The need for a vapor barrier was not a requirement of the Health Department; it was a recommendation of Braun Intertec.

24. Before settlement, Concordia discussed with then counsel for the Fund, Susan Anderson, how much the Fund would pay for the work Concordia had done as a result of the Cenex leakage. She advised Concordia that the Fund would only pay for the cost of items approved pursuant to the Health Department's recommendation. Exhibit 11, September 24, 1999, letter.

25. As of February 24, 2000, the Fund paid Cenex $3,424.82 of a claimed reimbursement of $8,805.36. The law requires that after the first $5,000.00 (deductible), the tank owner is required to pay 10 % of the remaining cost of the clean-up up to $150,000, and then the Fund pays 100% after $150,000, up to $1,000,000 (for each occurrence). The Fund pays only

for those costs of clean-up required by the Health Department. *See* N.D.C.C. §§ 23-37-12, 23-37-18, 23-37-27(9).

26. After the Judgment was entered against Cenex, Cenex placed the claim with the Fund for the amount of the Judgment, the additional amount of $125,000. The Fund's three member advisory board reviewed the Cenex claim and agreed to pay $14,269.26 of the $125,000 claim to cover the costs of an additional amount of dirt removed up to 500 cubic feet, but nothing further.

27. Cenex or some other entity could have continued on the Demised Premises for the purposes of operating a gas station and convenience store, with the installation of new tanks. Cenex decided not to continue on the Demised Premises. Actually, Cenex had made its decision not to continue to operate a gas station and convenience store on the Demised Premises prior to discovering leakage in the tanks. See FOF #s 8 and 9.

28. Cenex had some testing done before it entered into the Assignment and before the tanks were removed and had not discovered any tank leaks. Cenex did a tank tightness test, which did not reveal any problems. Cenex also did some pressure testing upon assignment of the lease, but also did not find any concerns. Cenex did not do any drillings on the property to determine if there was any leakage. But, Cenex suspected that the tanks probably had some leakage before the removal of the tanks, based on tank gauging. Cenex's inventory assessment showed fluctuations in inventory, probably about 25 gallons unaccounted for.

29. After discovering the leakage, Cenex retained Water Supply, Inc. for testing and monitoring. Water Supply is a reputable company, too.

30. Cenex operates about 20-25 gas stations in North Dakota. Cenex has previously experienced petroleum releases (leakage) in some its other gas station tanks. Most of Cenex's previous leakage problems also arose in tank removal situations. In regard to each of the other

incidents involving Cenex, the Fund reimbursed Cenex only for those cleanup expenses required by the Health Department.

31. There were test wells drilled on the property for monitoring, but not by Cenex. The test wells were not constructed at the request of the Health Department. Braun Intertec conducted tests related to the leakage at other locations around Dakota Square, besides at the Cenex gas station location.

32. The October 8, 1996, follow-up letter from the Health Department requested that Cenex conduct an investigation of the release, the release site, and the surrounding area possibly affected by the release. It also requested that Cenex "retain the services of an environmental consultant to … [**r**]**ecover free product** … [**p**]**erform groundwater monitoring** … [**c**]**omplete a receptor survey** within a one-block radius of the release site**." (**Emphasis in original.) Exhibit 4. The groundwater monitoring was to measure groundwater elevations and collect groundwater samples from each well without free product for analysis. *Id.* The letter specifically mentioned the possibility of further remediation work and further monitoring that may need to be done after Cenex's consultant filed its initial summary report. *Id.* See exhibits 6 and 7, Water Supply, Inc. summary reports based on their monitoring for Cenex. The letter specifically said that the need for additional work and any future monitoring activity would be later determined by the Health Department. *Id.*

33. There was, apparently, a July 16, 1997, monitoring event report submitted to the Health Department by Cenex or its consultant. It was not offered as an exhibit. The July 8, 1998, follow-up letter to that report from the Health Department requests that Cenex "continue with the following monitoring activities through this year (1998) … [**r**]**ecover free product** … if present …[**p**]**erform biannual groundwater monitoring** …[**c**]**omplete a receptor survey.**

Exhibit 5. This letter also specifically said that the need for additional work and any future monitoring would be later determined by the Health Department. *Id.*

34. Water Supply, Inc. filed two summary reports that are in evidence in this matter. The first in September 1998 (exhibit 7), the second in September 1999 (exhibit 6). These reports based on the work of Water Supply were independent of the Braun Intertec work. However, Water Supply used at least some Braun Intertec information in its work. It is unclear whether Water Supply used the previously installed monitoring wells in their monitoring. Some, but not all of these wells, were installed by Braun Intertec for Concordia. The September 1998 report shows that generally contaminant levels were decreasing, and states that "the conditions are unchanged, the area of hydrocarbon contamination is stable, and there is no danger to health and welfare." Exhibit 7. The September 1999 report shows that generally contaminant levels were decreasing and does not indicate any danger to health and welfare. Exhibit 6.

35. Health Department procedures for deciding appropriate corrective action upon discovering petroleum release varies by site, depending upon the location of the site, local hydrogeology, the soils present, proximity to business, proximity of residences, proximity to and kind of public utilities present, presence of surface streams, *etc.* The focus of determining appropriate corrective action (remediation) is on protecting public health and safety, not, necessarily, on returning the contaminated property to a totally uncontaminated condition or to a marketable condition. Assessing a site is a subjective task that also involves certain objective elements; it is a subjective task for Health Department professionals or their contracted consultants, not a task for other professionals. The Health Department provides its requirements for appropriate corrective action (remediation) to the tank owner or operator. *See* N.D. Admin. Code ch. 33-24-08.

36. How much contaminated soil the Health Department requires removed because of petroleum releases can vary. At the Cenex Dakota Square site, the Health Department required the immediate removal of 130 cubic yards of soil and were then satisfied with monitoring the site. Braun Intertec recommended to Concordia that it remove considerable additional soils, which it did (about 1600 cu. yds.), including the removal of soil on adjacent property. Concordia did not notify Cenex that it was removing the additional soil. Concordia did not notify the Health Department that Concordia was removing the additional soil. The Health Department would have allowed removal of up to 500 cu. yds. without further consideration and testing, but, at the time, it only required the removal of 130 cu. yds. There was contamination of soil on property adjacent to the Cenex property. The Administrator is now offering to pay Cenex for the cost of removing the additional soil, 130 - 500 cu. yds. See FOF #26.

37. The Health Department did direct that Cenex soak up free product, which Cenex had done. Their consultant used a manual absorption process. Cenex was compensated for this expense.

38. The Health Department did not require any monitoring to be done by Braun Intertec, but stated that some of the monitoring that they did would have been required. However, the evidence does not show how much of the monitoring by Braun Intertec would have been required. The Health Department did use some of the monitoring wells that were in place on the Cenex property prior to the tanks being removed. If the monitoring wells were not in place, the Health Department would have required that some monitoring wells be drilled.

39. The Health Department would have allowed Cenex to install complying new tanks to continue to operate as a gas station at the Dakota Square site.

40. It is cheaper and appropriate to take corrective action in regard to vacant property by natural attenuation, *i.e.*, to let the air and other environmental processes clean up the

contaminated soil. Removal of all the contaminated soil is not always necessary at a petroleum discharge site.

41. The administrator of the Fund estimated that the average claim paid by the Fund is approximately $7,500. He estimated the current Fund balance at $7,000,000. He said that the Fund is growing.

CONCLUSIONS OF LAW

1. In 1999, revisions to 1991 Sess. Laws, ch. 299 were passed. *See* H.B. No. 1404, 1999 Sess. Laws, ch. 244. Chapter 299, with 1999 amendments, is now codified at N.D.C.C. ch. 23-37. 1999 Sess. Laws, ch. 244 became effective on April 8, 1999, because it was passed as an emergency measure.

2. H.B. No. 1439, 1991 Sess. Laws ch. 299, became effective April 18, 1991. It, too, was passed as an emergency measure.

3. Cenex discovered the petroleum release (leakage) on its Dakota Square property on September 19, 1996, when it was removing the two gasoline tanks buried underneath the property. However, upon direction from the Health Department, Cenex had already applied for compensation from the Fund, on December 8, 1994, in connection with a drinking water problem it thought possibly related to petroleum release. Cenex made the Fund aware of its petroleum release claim on August 6, 1998. It made the Fund aware of the civil lawsuit against it by Concordia on August 24, 1998. The only events that occurred after the effective date of the new legislation (1999 Sess. Laws, section 244) were the settlement that occurred in October 1999, and the resulting Judgment by Concordia against Cenex entered on November 10, 1999.

4. The applicable law in this matter is the uncodified version of current N.D.C.C. ch. 23-37 found in 1991 Sess. Laws, ch. 299. *See* also, N.D. Admin. Code ch. 45-10-02, effective

June 1994.[1] It was the law in effect when the leakage was discovered by Cenex, when Cenex formally filed an application for compensation from the Fund, when Cenex first made the Fund aware that it had a claim for compensation from the Fund as a result of the Dakota Square leakage, and when Concordia filed suit against Cenex. The codified version of the law, effective April 1999, N.D.C.C. ch. 23-37 should not apply merely because Cenex and Concordia agreed to a settlement of the lawsuit and, then, Concordia filed a notice of entry of Judgment against Cenex after the effective date of the new law, or because Cenex paid Concordia as a result of the Judgment after the effective date of the new law. It is true that the reimbursement that Cenex now seeks stems from the Judgment by Concordia against Cenex, but that Judgment stems from the petroleum release discovered in 1996 and Cenex first applied for reimbursement in regard to this claim for compensation in 1994.

5. In workers compensation cases, unless otherwise provided, statutes in effect on the date of the injury apply to claims for compensation under the law. *Saari v. North Dakota Workers Comp. Bur.*, 598 N.W.2d 174 (N.D. 1999). This is an analogous situation. The date of the discovery of the petroleum release should be the date for determining which statutes apply in a claim for compensation from the Fund.[2]

6. 1991 Sess. Laws, ch. 299, established a petroleum tank release compensation fund with an advisory board to review claims against the fund. 1991 Sess. Laws, ch. 299, sec. 1.[3]

7. 1991 Sess. Laws, ch. 299, § 12 states as follows:

> Section 12. The owner or operator is liable for the cost of the corrective action required by the department, including the cost of investigation the releases, and for legal actions of the administrator or the department. This chapter does not

[1] After the effective date of the new legislation and codification, amendments to the rules were adopted. *See* N.D. Admin. Code ch. 45-10-02, effective January 2000.
[2] Cenex argues that a different result would be obtained under the laws in effect beginning April 1999, codified now in N.D.C.C. ch. 23-37. In regard to this matter, the ALJ is convinced that even with the changes in law, the statutory scheme for compensation has not changed significantly so as to require a different result.
[3] Now codified at N.D.C.C. § 23-37-01.

> create any new cause of action for damages on behalf of third parties for release of petroleum products against the fund or licensed dealers.[4]

(Emphasis Supplied.) *See* N.D. Admin. Code ch. 33-24-08.

8. "Corrective action" is defined as "an action taken to minimize, contain, eliminate, remediate, mitigate, or clean up a release, including any remedial emergency measures. The term also includes compensation paid to third parties for bodily injury or property damage which is determined by the board to be eligible for reimbursement. The term does not include the repair or replacement of equipment or preconstructed property." (Emphasis supplied.) 1991 Sess. Laws, ch. 299, § 2.[5] *See* N.D. Admin. Code ch. 33-24-08.

9. When corrective action is required, an owner or operator may make request to the Fund for reimbursement. Upon request for compensation, the Administrator may not make reimbursement, "unless the administrator determines that:

> 1. ***
> 2. The department was given notice of the release as required by federal and state law;
> 3. ***
> 4. The owner or operator, to the extent possible, fully cooperated with the department and the administrator in responding to the release.

1991 Sess. Laws, ch. 299, sec. 18[6]

10. Under the statutes and the rules, the administrator of the fund may reimburse owners and operators of tanks for petroleum releases for corrective action under certain criteria. *See* N.D. Admin. Code § 45-10-02-06. Under N.D. Admin. Code § 45-10-02-06(4) eligible costs for corrective action include labor and use of machinery, consultant fees, if authorized by the Health Department, and any other costs the administrator and the board deem to be reasonable

[4] Department means the state department of health. 1991 Sess. Laws, ch. 299, § 2, now codified at N.D.C.C. § 23-37-02 (6).
[5] This subsection is now codified at N.D.C.C. § 23-37-02 (4).
[6] Now codified at N.D.C.C. § 23-37-18.

and necessary to remedy cleanup of the release and satisfy liability to any third party. N.D. Admin. Code § 45-10-02-06(4)(a), (c), (g), (h). Under N.D. Admin. Code § 45-10-02-06(5) certain costs are not eligible costs, including decreased property value, the cost of making improvements to the facility beyond those that are required for corrective action, and costs in excess of those considered reasonable by the fund. N.D. Admin. Code § 45-10-02-06(5)(e), (i), (k). The compensation or costs sought by Cenex as a result of the Judgment fall under the category of ineligible costs rather than eligible costs. Arguably, some of them may fall under eligible costs, but they were not reasonable and necessary costs and were not approved or authorized by the Health Department.

11. The administrator, then, determines what is reasonable and necessary relying upon the guidance of the Health Department which makes assessments and states requirements as the result of a petroleum release at a particular site. In *Gottbrecht v. State*, 598 N.W.2d 794 (N.D. 1999), the North Dakota Supreme Court, in reviewing *Gottbrecht's* rights and responsibilities arising out of a petroleum release said, "[t]hus, the Health Department may require reasonable and necessary corrective actions when a release occurs, and an owner or operator may apply for reimbursement of the cost of corrective action, but a reimbursement may not be made from the Fund unless the administrator determines the costs were reasonable." 598 N.W. at 799. The court went on the say the following:

> Determining what corrective actions to require upon a release involves considering the nature and extent of the damage caused by the release, the risk to public health and the environment, issues of policy and government discretion, and the feasibility of possible corrective actions. Chapter 299 gives the Health Department and the administrator of the Fund discretion to determine which corrective actions are reasonable and necessary in light of the public health and environmental risks posed by a release. The administrator determines whether the costs for which reimbursement has been requested were actually incurred and were reasonable. *Gottbrecht* has demanded a judgment declaring the Fund must pay the cost of corrective measures the Health Department and the administrator of the Fund have not determined are reasonable and necessary. *Gottbrecht* has

> not shown a clear legal right to performance of the acts he has sought to be compelled.

Id.

12. The situation in this matter is similar to that in the *Gottbrecht* case. Cenex has not proven that it is entitled to reimbursement for corrective measures that the Health Department and the administrator of the Fund have not determined are reasonable and necessary. It has not proven that any of the costs it seeks as a result of the Judgment are eligible costs under N.D. Admin. Code § 45-10-02-06. The evidence does not show, by the greater weight of the evidence, that corrective measures taken by Concordia, the costs of which were paid by Cenex pursuant to settlement and Judgment as a result of a civil action, are reasonable and necessary under standards used or that would have been used by the Health Department and approved by the Administrator. The evidence does not show, by the greater weight of the evidence, that corrective measures taken by Concordia, the costs of which were paid by Cenex pursuant to settlement and Judgment as a result of a civil action, are eligible costs under N.D. Admin. Code § 45-10-02-06. The Health Department and the Administrator have only determined that the following costs for corrective measures are reasonable and necessary: $8,805.36 claimed by Cenex (of which the Fund actually paid $3,424.82 under the statutory scheme) and $14,269.26 (which the Fund has agreed to pay under the statutory scheme, but which has not actually been claimed by Cenex or paid, yet). The $3,424.82 was paid before the Judgment. The Administrator agreed to pay the $14,269.26 after the Judgment. The Administrator agreed to pay the additional amount, the $14,269.26, because it represents an additional, reasonable and necessary amount for reimbursement for additional earth removal that the Health Department either approved or would have approved. The Health Department and the Administrator have not determined that any of the remainder of the $125,000 Judgment, nothing further for

additional earth removal, nothing for consulting by Braun Intertec, and nothing for placement of a vapor barrier are reasonable and necessary. The Health Department did not require additional earth removal, consulting by Braun Intertec, or placement of a vapor barrier as corrective action. The Health Department and Administrator determinations in this regard are appropriate and correct under the law. However, there may be some additional costs that the Health Department and the Administrator would approve, costs relating to consulting work, drilling test wells, and monitoring, if such costs are specifically identified and submitted.

EVALUATION OF EVIDENCE AND LAW

Concordia has a right to clean up its property in a way that it deems reasonable and necessary, but the real issue in this matter is who, then, pays for Concordia's clean-up. Certainly, Concordia had a right to make a claim for reimbursement from the Fund, just as Cenex has done, but it did not do so. Instead it chose to sue Cenex. Cenex settled with Concordia and paid Concordia the Judgment that resulted from that settlement. Concordia selected its remedy, but that does not mean that the Fund automatically pays what Concordia claimed, and what Cenex agreed to in regard to that claim. The problem in this scenario, what Cenex proposes is correct and appropriate under the law, is that the Health Department never approved what Concordia did. Perhaps they would have approved or required some of what Concordia did (drilling test wells, monitoring with existing test wells, further Braun Intertec consulting) but Concordia did not apply for compensation from the Fund to reimburse costs it incurred. Concordia sued and now Cenex seeks to have the Judgment against it automatically approved, after the fact. Under the law, before the 1999 changes, the Fund is not designed to operate in this manner.[7]

[7] Arguably, after the 1999 changes, too, the law is not designed to operate in this manner, but that is not in issue.

Although there could have been Health Department approval of some of the costs that Concordia incurred, the big difference between the corrective action required of Cenex by the Health Department and the clean-up done by Concordia is that the Health Department required what was reasonable and necessary to protect the public health and safety. Concordia did what it believed was reasonable and necessary to return the property to its value before the leakage. The evidence shows that what Concordia did was not reasonable and necessary, under the law, from the Health Department's and Administrator's points of view, because the property could have continued to be used as it was before the leakage, *i.e.*, as a gas station and convenience store.

In reality, then, Concordia did more than what was required to return the property to the same use prior to the leakage. Much less corrective action was required if the property was to continue to be used as a gas station and convenience store. Much more corrective action was likely required if the property was not to continue to be used as a gas station. It was a business decision by Cenex and Concordia not to continue the use of the property as it was used just prior to the leakage. The Fund should not pay for that business decision. In reality, then, Cenex is claiming compensation, in part, for a general decrease in property value stemming from returning the property to a condition that precedes the Lease. It is claiming far more than was necessary to return the property to its actual use just prior to the leakage, *i.e.*, its use as a gas station and convenience store.

The Health Department's required corrective action was all that was necessary for continued use as a gas station and convenience store. Concordia's clean-up was clearly more than required for that use. The Health Department's corrective action was health and safety oriented considering the use when the leakage occurred. Concordia's clean-up was oriented to a different use of the property, a use that preceded the Lease purposes and resulted from Cenex's business decision to remove the gas station and convenience store.

It appears from the evidence that Cenex presented Concordia a *fate accompli* in that regard. The gas station could have been operated for a number of years if Cenex had merely replaced the tanks and continued operation. The Fund is not designed to reimburse for all claims and certainly not for clean-up resulting from a business decision. The Administrator and the Health Department are merely looking behind the Judgment and using their discretion under the statute and rules to pay what is reasonable and necessary to protect the public health and safety. Concordia and, now, Cenex have different priorities than those strictly under the law. The Health Department assessment in this matter is valid, as are the requirements of corrective action that it made of Cenex. There has been no showing that it was not valid and correct under the law. There has been no showing of a need for additional corrective action, except the $14,269.26, and, perhaps for the cost of drilling some or all of the test wells, the costs of additional monitoring, and the costs of some consulting work, provided Cenex specifically applies for those costs, and documents the need for them in relation to Health Department requirements for remediation.

Though not determinative in this matter, Concordia is not really a bona fide third party in the consideration of an application for compensation by Cenex. Concordia was the Landlord with considerable rights under the Lease. Concordia had a substantial interest financial and reversionary interest in the Demised Property. It was not a disinterested, innocent third party. It could have made a separate claim from the Fund, but chose not to. Concordia assumed some of the risk in this gas station/convenience store venture, too. It has no right to demand that the property be restored to a general market value of the property as it existed before the Lease (at today's prices). Standing in Concordia's shoes, neither does Cenex have such a right. Concordia may or may not have had a right to demand that Cenex reimburse Concordia for the results of Cenex's business decision to remove the gas station, but that was an issue in the lawsuit, not an

issue for this administrative matter. Cenex admitted that if it were the owner of the Demised Property it would have had no right to additional reimbursement from the Fund. Concordia, as owner, has no right to additional reimbursement from the Fund through its lawsuit against Cenex and Cenex's resulting claim to the Fund for reimbursement. Concordia must be subject to the same standards for assessment and reimbursement as is Cenex. Again, the Administrator must look behind the lawsuit, and it did. From the Health Department's perspective, under the applicable laws, it was not reasonable and necessary to clean up the property to the extent that Concordia did.

The Administrator properly denied Cenex's request under the applicable law because those costs were ineligible and were not required as reasonable and necessary for health and safety reasons.

It appears that it would not be unusual for an private expert (consultant) to say to a petroleum marketer that they believe that more should be done than what the Health Department requires to clean up a petroleum release, but, again, a consultant may be looking at the clean-up from a different perspective. In this matter, the Health Department perspective is supported by the law. The law does not, and neither should it, guarantee compensation based on what a consultant might recommend to a petroleum marketer. The Judgment put Cenex in a different position that it might otherwise have been in, but this is not the Fund's fault and is not the Fund's responsibility. Cenex decided to settle the lawsuit and pursue reimbursement from the Fund, but that does not mean that the Fund is liable.

It is Cenex's burden to show that it has a valid, reimbursable claim from the Fund, beyond what the Administrator and the Health Department determined. It has not met that burden. If Cenex wanted additional protection, beyond what the Fund can provide under the law, it should have purchased insurance. Cenex well understands the limits of the law, from previous

experience with applications to the Fund. The ramifications of Cenex's decision to remove the gas station and discontinue Lease operations, which resulted in Concordia's expanded clean-up and subsequent lawsuit, is Cenex's burden, not the Fund's.

RECOMMENDED ORDER

The greater weight of the evidence shows that Cenex is entitled to compensation from the Fund based on the facts proven in this matter and under applicable laws. It is entitled to compensation from the Fund in the amounts already determined by the Administrator and paid to Cenex. Additionally, Cenex may be entitled to additional compensation from the Fund, at least in the amount of $14,296.26, provided it makes the appropriate further claims for additional compensation. Cenex is not entitled to compensation from the Fund for the amount of the Judgment by Concordia against it in the amount of $125,000. Neither the Administrator of the Fund nor the Health Department violated any provisions of the applicable laws in considering Cenex's application for compensation from the Fund. Under the law, Cenex is not entitled to damages, attorney's fees, and costs in addition to the compensation from the Fund to which Cenex is entitled under applicable law. Based on the foregoing findings of fact and conclusions of law, it is HEREBY ORDERED that Cenex is not entitled to any further compensation from the Fund than has already claimed and paid by the Administrator of the Fund, except that if it makes appropriate, further claims, Cenex may be entitled to additional compensation from the Fund, at least in the amount of $14,296.26.

Dated at Bismarck, North Dakota, this 9th day of August, 2000.

State of North Dakota
Glenn Pomeroy
Commissioner of Insurance

By: _____
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